Supreme Court, U.S.
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NO.

IN THE

Supreme Court of the United States

October Term, 1991

WILLIAM UTESCH, MICK DREA,
VICTOR C. TOMKA, CLARENCE VOS, *ET AL.*,
Petitioners,

v.

THOMAS H. DITTMER AND REFCO, INC.,
Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the court below violate the seventh amendment when, under the guise of finding insufficient evidence to support the verdict, the court substituted its determination of the evidence and inferences to be drawn in lieu of the jury's findings

a. that there was unlawful commodities market manipulation,

b. that the defendants' unlawful conduct caused the plaintiffs' injuries, and

c. that there was an antitrust conspiracy between Dittmer and Refco,

where the evidence and inferences showed (i) artificially high cattle futures prices caused by the defendants, a large futures commission merchant house (Refco, Inc.) and its president (Dittmer), who had aggressively promoted the futures to their many customers during the months before the October 1979 delivery month, (ii) a crash of those futures prices in the first days of the delivery month, (iii) massive, unprecedented cattle deliveries in the futures market by the defendants during those days, (iv) a crash of the cash cattle market price caused by the drop in the futures market, (v) Dittmer's huge profits from personal trading in cattle futures during October 1979, (vi) Dittmer's status as a cattle producer in competition with the plaintiffs, and (vii) sales by plaintiffs of cattle at artificially low prices in the cash market?

2. Did the court below err in restricting recovery under § 9(b) of the Commodity Exchange Act by requiring sellers of cattle in the cash market to prove that manipulation of the futures market for live cattle resulted in an artificially low

futures price, thereby precluding the sellers' recovery in this case, where the evidence and its inferences established that manipulation caused an artificially high futures price that was followed by a futures market crash which caused an artificially low cash market price?

3. Did the court below err in reversing the antitrust verdict for the plaintiffs by concluding that there was insufficient proof of conspiracy under Sherman Act § 1 without considering that the evidence showed that defendant Dittmer, in his individual capacity as a cattle feeder and futures speculator, had conspired with the commodities firm, Refco, acting through him as its president and chief executive officer?

PARTIES TO THE PROCEEDING

The petitioners ("Petitioners"), all of the plaintiffs-appellees below, are Rodney Amlie, Kenneth Becker, Marcell Becker, Leon Bruns, Mick Drea, Merlyn Hegland, Floyd Jansma, Stanley Pankratz, Estate of Carl Pennings, Lee Stoll, Victor Tomka, William Utesch (together with Triple U Ranch), Clarence Vos (together with Idlewild Farms, Inc. and Vos Co.), Carl Winterboer, and Thaine Wulf. The defendants-appellants below and respondents on this Petition are Thomas H. Dittmer ("Dittmer") and Refco, Inc. ("Refco"). Counsel for Petitioners know of no parent or non-wholly owned subsidiaries of any of the corporate parties required to be listed pursuant to Supreme Court Rule 29.1.

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PRIOR REPORTED OPINION IN THE CASE

The opinion of the court below is reported as *Utesch v. Dittmer*, 947 F.2d 321 (8th Cir. 1991) (hereinafter referred to as "*Utesch*").

JURISDICTIONAL BASIS

The judgment of the court below was entered on October 17, 1991. A timely motion for rehearing was denied on December 2, 1991. Accordingly, the Court has jurisdiction pursuant to 28 U.S.C. §§ 1254, 2101(c); Supreme Court Rule 30.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The seventh amendment of the United States Constitution states:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

At the relevant time, section 9(b) of the Commodity Exchange Act ("CEA"), as amended, 7 U.S.C. § 13(b), provided in pertinent part as follows:

> It shall be a felony . . . for any person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any contract market, or to corner or attempt to corner any such commodity, or knowingly to deliver or cause to be delivered for transmission through the mails or in interstate commerce by telegraph, telephone, wireless, or other means of communication false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce . . . .

Section 1 of the Sherman Antitrust Act, as amended, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony.
>
> . . .

STATEMENT OF THE CASE

This litigation was commenced in the United States District Court for the Northern District of Iowa in the fall of 1983, slightly less than four years after the events at issue. The original plaintiffs were Messrs. Utesch, Tomka, Drea, Vos, and certain related entities. In April 1985, the other plaintiffs moved to intervene, and that motion was granted on April 22, 1985. The four cases were consolidated and went to trial in October 1989, and the jury found for plaintiffs on all three claims submitted: market manipulation under § 9(b) of the CEA, as amended, 7 U.S.C. § 13(b), restraint of trade under § 1 of the Sherman Act, as amended, 15 U.S.C. § 1, and § 1962(c) of RICO, 18 U.S.C. § 1962(c).[1] The jury's determination was in the form of a special verdict.

The district court denied the defendants' motions for judgment n.o.v. or a new trial. 27a.[2] Judgment for more than $229,000 was entered that day in accordance with the court's rulings (46a), and thereafter an amended judgment for treble damages was entered. 49a.

The evidence showed that defendant Dittmer was the president, chairman, and 80% controlling shareholder of Refco, a commodities futures brokerage firm. Tr. 968:1-20. Refco was perhaps the largest such firm on the Chicago Mercantile Exchange ("CME"), and Refco clearly held a leading position in the market for live cattle futures. Exh. 30

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1. Jurisdiction of the district court was founded on 28 U.S.C. §§ 1331, 1337; 15 U.S.C. § 15; and 18 U.S.C. § 1964(c).

2. Citation in this form is to a page in the Appendix to this Petition.

(Refco held 60% of open long interest). Dittmer was generally looked to as a leading authority in cattle futures. In addition, he held a 50% interest in a large cattle feedlot, Cactus Feeders, Inc. Tr. 971:8-12.

During the August-October 1979 period, Dittmer and others repeatedly exhorted Refco brokers and their customers to "get long the cattle," to "load the boat," and even to "mortgage the farm." Tr. 949:6-15. Dittmer said he wanted Refco as a whole to be long 20,000 October contracts, and that cattle would hit $85/hundredweight. Tr. 1298:22-1299:20. The basis of these exhortations was Dittmer's repeated statements, and those of others at Refco, that cattle prices would go up significantly and that therefore both he and Refco were bullish to the market. These exhortations were usually right after the market closed. They were transmitted to all Refco offices nationwide by a speakerphone hookup defendants referred to as the "hotline."

Two witnesses, Roger Johnson, head of Refco's Des Moines, Iowa office, and Ed Apel, a pit trader at the CME, both testified that, while Dittmer continuously projected a bullish, optimistic image of the cattle futures, especially the October 1979 contract, actually he was bearish or pessimistic. Tr. 1187:8-17; 1191:17-1192:4; 1416:13-21. Thus, Dittmer's numerous public statements were false because they were contrary to his actual beliefs.

When the first days of October 1979 arrived, an unprecedented surge in deliveries occurred in the futures market. The U.S. Department of Agriculture reported that "the normal supply-demand relationship of slaughter cattle . . . was distorted." Exhibit 54. Dittmer and Refco accounted for a major portion of the sudden deliveries.

Dittmer and Refco accounted for more than 55% of the October 1 cattle futures deliveries, and in excess of 24% of the deliveries the next day. On October 3, Refco deliveries were almost 57% of the total. Exhs. 51 and II. The total of these massive deliveries in October 1979 was unprecedented. Exh. 51. They caused a precipitous drop in the futures market that in turn caused the cash cattle market to collapse. Tr. 1454:18-24. The evidence pointed to Dittmer as the primary cause. Tr. 1463:19-1465:3, 1468:6-9.

That is no surprise. Dittmer had previously confided in Johnson that he, Dittmer, intended to control the cattle market (Tr. 1414:9-11) and that he intended to drive the cattle market price low. Tr. 1416:1-2; 1424:4-6 (51a - 52a). That was in September 1979. Tr. 1424:3 (52a). Presumably, this would cause huge losses to his competitors in the cattle producing market. Indeed, there was evidence that Dittmer's own quantity of cattle on feed was at a minimum. Tr. 1298:3-8. He could expect, therefore, that his competitors -- but not he -- would feel the impact of the 5 week collapse of the cash cattle market from October 2 through November 7, 1979.

The plaintiffs testified that, indeed, they suffered significant losses in their cash cattle sales during that period, and Dr. Beyer, plaintiffs' expert economist, concluded that the cash market price was artificially low during that period. Tr. 1454:9-13; 1455:8-16. Both Beyer and the plaintiffs testified that, up to the time of the crash, all conditions appeared to be stable and normal. Beyer was also able to determine that, but for these extraordinary events, cash market prices would have been higher than they were. At

the same time, Dittmer made over $2 million profits in trades in three accounts (Tr. 1584:19-1585:1; 1585:23-1586:1), and he gained nearly $3.9 million in proceeds of trades in other accounts. Exhibits Z, p. 96; X, pp. 179-180.

The jury returned its verdict in the full amount of plaintiffs' claims. As discussed below, a writ of certiorari should issue so the Court may adjudicate significant issues of federal law and jurisprudence and, as a result, reinstate the jury's verdict.

REASONS FOR GRANTING THE WRIT

I. The Seventh Amendment Prohibition of Appellate Judges Functioning as "Superjuries" is a Fundamental Component of Our Federal Judicial System Warranting the Court's Protection by Granting the Writ.

A. The Court has Jealously Guarded the Constitutional Allocation of Fact Finding to the Jury.

The seventh amendment, an important component of our Bill of Rights, actually affords two different but interrelated protections to civil litigants in federal courts. The guaranty of trial by jury in civil cases (which is not directly implicated here, since there was a jury trial below) would be substantially diluted in the absence of the further guaranty that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII.

Although not the subject of recent decisions by the Court, the right to a jury trial in civil cases has been regarded as an essential civil right throughout our nation's history since even before adoption of the Constitution.

> The institution of jury trial in civil cases was a familiar and well-ensconced feature of pre-1787 political life. . . . Legal writers and political theorists who were widely read by the colonists were firmly of the opinion that trial by jury in civil cases was an important right of freemen.

C. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 653-54 (1973) (footnote omitted).

The Court has upheld the civil jury right -- and the seventh amendment's prohibition of judicial reexamination of jury-found facts -- on numerous occasions. *See*, *e.g.*, *Baylis v. Travelers' Ins. Co.*, 113 U.S. 316 (1885); *Jacob v. City of New York*, 315 U.S. 752 (1942). In *Jacob*, the Court stated:

> The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts.

315 U.S. at 752-53. The Court reversed the affirmance of a directed verdict in that case, explaining, "Without doubt the case is close and a jury might find either way. But that is no reason for a court to usurp the function of the jury." *Id.* at 756.

This Petition presents the important question whether in this case, by reversing the judgment entered on the jury's verdict, the court of appeals usurped the jury's constitutional function. Preservation of the strict limits on judges to prevent them from second guessing a jury's fact finding has commanded the Court's jealous protection in the past. *See Baylis v. Travelers' Ins. Co., supra*; *Jacob v. City of New York, supra*. Moreover, as explained in Part C of this Point below (at pp. 19-21), the resolution of the question presented here has implications far beyond the interests of the litigants before the Court.

B. The Court Below Violated the Seventh Amendment by Substituting the Court's Evaluation of the Evidence and Inferences for the Determination by the Jury.

The court of appeals overturned the jury's verdict based upon the court's findings as to three essential facts. These facts, as originally found by the jury, were supported by ample evidence and reasonable inferences from that evidence, and accordingly the experienced district court chief judge who heard the evidence denied the defendants' motion for judgment n.o.v. The key facts on which the appellate court substituted its judgment for the jury's include whether (1) the defendants knowingly delivered, or caused to be delivered, false or misleading or knowingly inaccurate

reports regarding the live cattle or live cattle futures market; (2) whether the plaintiffs' showed that their injuries on the commodities manipulation claim were proximately caused by the defendants' conduct in the cattle futures market[3]; and (3) whether Dittmer conspired with Refco.

The appeals court chose not to believe the evidence of the falsity of Dittmer's pre-October exhortations about the futures market. That evidence included Roger Johnson's testimony that, in September 1979, Dittmer said he was bearish about the cattle futures prices, even though his contemporaneous public statements were bullish, and that Dittmer had confided that he sought to harm small cattle producers (like the plaintiffs here) by controlling the cattle market and driving the cash market price down. Tr. 1414:7-11; 1415:18-1416:2; 1416:13-21; 1424:3-6. *See* 51a-52a. Under the court's own standard, that "[a]n expression of opinion may constitute fraud . . . if the actor knew when stating the opinion that it was false," *Utesch*, 947 F.2d at 329, the court was required by the seventh amendment to uphold, not overturn, the jury's verdict on this issue. Accordingly, the court should have affirmed both the market manipulation claim under the CEA and the RICO judgment.

Similarly, there is sufficient evidence in the record to support reasonable inferences as to both proximate causation of the plaintiffs' injuries and Dittmer's antitrust conspiracy

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3. The court of appeals purported to rule, as a matter of law, that plaintiffs were required to prove that the low cash market prices were caused by artificially *low* futures prices. *See* Point II below.

with Refco.[4] These are discussed in greater detail in Points II and III below, respectively. As to the antitrust conspiracy issue, the court of appeals also disregarded the evidence of conspiracy by Dittmer with brokers at Refco to raise futures prices before October, saying that "[s]uch a conspiracy would have helped rather than injured the plaintiffs, since they would have obtained higher rather than lower prices for any cattle they sold *during the time of such agreement*." 947 F.2d at 330 (emphasis supplied). This confuses causation of injury with whether there was evidence of conspiracy and demonstrates how untenable the decision below is. For, although sellers of cattle in the cash market before October 1979 might have benefitted from such conspiratorial conduct,[5] the cash market during October was clearly "restrain[ed]," according to the U.S. Department of Agriculture. Exh. 54, p.2; Tr. 1540:16-19. The plaintiffs' economist concurred.

C. Review of this Case is Necessary to Protect and Uphold Petitioners' Seventh Amendment Rights and the Rights of Litigants in Other Cases.

The procedural posture of this case mandates review of the merits by the Court. This Petition arises in the

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4. The causation argument concerns an upward manipulation which resulted in an artificially inflated futures price from which the market crashed following defendants' massive deliveries, causing a depression of the cash market price below what normal supply and demand considerations would have dictated. The conspiracy issue concerns Dittmer's conspiring with Refco.

5. There is no record evidence to support this hypothesis by the court below.

context of (1) a jury verdict for the plaintiffs, (2) followed by a denial by the district court of motions for judgment notwithstanding the verdict and for a new trial, (3) followed by a reversal on appeal. In these circumstances, the Court stands as the only effective appellate remedy to protect Petitioners against violation of the seventh amendment.

In other procedural contexts there rarely would be need for review by the Court to uphold the seventh amendment jury-found-fact rights of the litigants. For example, when a district court grants a motion for judgment n.o.v., appellate review of any resulting seventh amendment claim is afforded by the court of appeals. Further review by the Court of an affirmance in such cases is ordinarily not justified, since the petitioner has already had appellate consideration of the constitutional issue. Similarly, no seventh amendment concern arises when the appellate court affirms a denial of a judgment n.o.v. or reverses the grant of such a judgment, since the effect of the appellate ruling in either case is to uphold the jury's verdict.

Naturally, the procedural status of this case is not unique, and Petitioners do not suggest that the Court must review every case where a court of appeals has reversed the denial of judgment n.o.v. For nearly 24 years, however, the Court has not granted review of a seventh amendment claim arising from the appellate overturning of a jury verdict. E. Schnapper, *Judges Against Juries -- Appellate Review of Federal Civil Jury Verdicts*, 1989 WISC. L. REV. 237, 238 (1989) (hereinafter cited as "*Judges Against Juries*"). It has been reported that, during this period, a substantial body of evidence has developed demonstrating that "a large number of appellate judges cannot resist acting like superjurors, reviewing and revising civil verdicts to assure that the result

is precisely the verdict they would have returned had they been in the jury box." *Id.* at 354. Thus, while "federal courts of appeals have repeatedly professed that they would not award judgment n.o.v. . . . except in a very small number of cases," it has become clear that "[t]hese professions of judicial self-restraint . . . are belied by actual practice." *Id.* at 245-46 (footnote omitted).

To remedy such a judicial usurpation of the jury's function and to discourage it from recurring in the future, the Court in 1968 unanimously granted certiorari and summarily reversed the appellate decision in *International Terminal Operating Co. v. N.V. Nederl. Amerik Stoomu. Maats.*, 393 U.S. 74 (1968). The Court expressly relied upon the seventh amendment in its per curiam opinion. There is a strong need for review of the issue again now to remedy the erosion of the seventh amendment that has been observed in the interim.

Public policy thus militates strongly in favor of granting this Petition, so the Court can exercise its critical power of supervision over the courts of appeals to remedy the significant constitutional violation that is growing more common. *See* Supreme Court Rule 10.1(a). Such review is necessary to signal the Court's determination "to restore the vitality of the seventh amendment." *Judges Against Juries*, 1989 WISC. L. REV. at 355.

II. The Court Should Review the Ruling Below, which Improperly Restricts the Private Right of Action Intended for the Protection of those Injured by Commodities Manipulation.

The ruling below artificially restricts the private right of action which the Court has previously found Congress

intended to be implied under § 9(b) of the CEA, 7 U.S.C. § 13(b). *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353 (1982) ("*Curran*"). Since the private right of action has been judicially implied to carry out the important regulatory and compensatory purposes Congress intended in enacting the CEA, any unjustified restriction on the right of action is a significant matter of national policy. *See Curran*, 456 U.S. at 387 ("[T]he private cause of action enhances the enforcement mechanism fostered by Congress over the course of 60 years.")

Because the ruling below involves an important issue of federal law, is at odds with the Court's reasoning in *Curran*, and directly conflicts with a Second Circuit decision, the Court should grant this Petition. *See* Supreme Court Rule 10.1(a), (c).

A. The Ruling Below is an Unwarranted and Unreasonable Restriction of the Private Right of Action.

The *Utesch* ruling below imposes just such a restriction without justification either in the record or as a matter of policy. The Eighth Circuit improperly and unreasonably required the plaintiffs, who sustained losses from the sale of a commodity in a cash market, to show that those losses were caused not merely by artificial prices in the futures market for that commodity, but by artificially *low* futures prices. *Utesch*, 947 F.2d at 325 ("it was necessary for the plaintiffs to prove that Dittmer's and Refco's actions were intended to and did produce an artificially low price for the October 1979 live cattle futures contract"), 327 ("the plaintiffs were required to show that the post-October 2

prices in the October 1979 futures market were artificially low").

The decision in *Utesch* imposes an unreasonably narrow limit on the degree of economic causality a plaintiff may show to recover damages in a private action under the CEA. The court below required plaintiffs, who sold cattle in the cash market, to show that defendants caused an artificially low cattle futures price in order to recover. The court held, as a matter of law,[6] that it was insufficient to show, as the plaintiffs did show, that the defendants caused an artificially *high* futures price which ultimately resulted in a lower cash market price and harm to the cattlemen. The rejection of this line of causation, as a matter of law, significantly restricts actions private litigants were intended by Congress to be able to bring for redress under the CEA. The *Utesch* decision, moreover, rejects as a matter of law the economic reality found as fact by the jury under appropriate instructions. As a result, therefore, the court of appeals decision conflicts with congressional intent and with economic sense. There is no principled policy basis to justify such a result.

There is ample evidence in the record that the defendants, through the Refco hotline, intentionally caused futures prices to rise in the period prior to October 2, 1979. *Utesch*, 947 F.2d at 326. There is expert testimony that the cash price in the period following October 1 was artificially

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6. Although characterized by the court of appeals as a ruling on a matter of law, the decision bears all the hallmarks of a factual determination that is contrary to the jury's findings. Accordingly, the ruling below directly implicates the seventh amendment question raised by this Petition.

low.[7] *Id.* at 327; Tr. 1455:8-16. The court of appeals did not dispute that a reasonable jury could have found, consistent with the direct economic testimony in the record, that the sharp decline in the futures prices from the artificial level induced by defendants caused the drop in the cash price. Instead, the court of appeals held that

> [t]o establish manipulation that injured them, the plaintiffs were *required* to show that *the post-October 2 prices in the October 1979 futures market were artificially low*, i.e., lower than they would have been under the operation of normal supply and demand market forces, and that the decline in the futures price was a proximate cause of the decline in cash prices.

Utesch, 947 F.2d at 327-28 (emphasis added).[8]

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7. Since the experts for the plaintiffs and defendants all agreed that the futures price and the cash price converge in the delivery month, and since there was evidence from plaintiffs' economist, Dr. Beyer, that the cash price was artificially low from October 2 through November 5, 1979, the jury properly could draw the inference that the futures price, having converged with the cash price during this period, was equally artificially low. The court below, while creating the new requirement that the futures price must be artificially low, never considered this evidence even under the court's unduly restrictive test.

8. In support of its conclusion, the appeals court mischaracterized the plaintiffs' argument, stating that their theory was that the artificially high pre-October 2 futures prices caused (or, in the court's wording, "produced") the subsequent cash price crash. *Utesch*, 947 F.2d at 328. In fact, it has consistently been the (continued...)

There is no reason for the artificial restriction on private actions under the CEA the court below imposed. In fact, the decision runs counter to economic logic. Futures markets are not only used to hedge risk; they are used by market participants to gauge underlying supply and demand. A high futures price is a signal to producers or farmers to increase production. A person who causes an artificially high price sends false signals to the marketplace to increase production. Increases in supply induced by artificially high futures prices could then predictably cause drops in the cash price and result in losses to producers.

Harm caused in such a manner would be non-actionable under the requirement imposed below that a plaintiff who incurs losses in selling a commodity in the cash market must first show that unlawful manipulation resulted in an artificially low futures price, as opposed to an artificially high futures price. But harm from excessively high futures prices is well within economic probability and is likely to occur in the future. The decision below therefore involves an important matter of federal law that should be reviewed by the Court to assure that future plaintiffs are not improperly excluded from compensatory recovery for harm caused by violations of the CEA.

8.(...continued)
plaintiffs' position that the crash from the artificially high futures prices was caused by the huge, unprecedented quantities of cattle deliveries against futures contracts in the earliest days of October. The court had earlier acknowledged that the plaintiffs contended that it was the defendants' "deliver[ies] of a large amount of cattle on October 2 and 3" that "lowered the futures price and unduly depressed [cash] cattle prices." *Id.* at 326.

B. The Decision Below Conflicts with a Decision of the Second Circuit.

The restriction imposed by the court below conflicts with the decision in *Leist v. Simplot*, 638 F.2d 283 (2d Cir. 1980), *aff'd sub nom. Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353 (1982). In *Leist*, one of the plaintiffs, Incomco, owned 1,500,000 pounds of potatoes. Incomco sued a group of defendants who conspired to cause a rise in futures prices. In order to cause this rise, the defendants tied up all available freight, hoping to prevent Incomo's delivery to a group of short speculators, so they would not have Incomo's potatoes to deliver against their short contract obligations. Due to the defendants' actions, Incomco could not deliver its potatoes to the short speculators, and the potatoes rotted. The Second Circuit upheld Incomo's complaint as stating a claim upon which relief could be granted. It was sufficient that the harm was caused by actions that were part of a scheme which violated the CEA. There was no requirement that the harm to Incomo must be a direct cause of an intended artificially low future price, for clearly the claim was that Incomo was harmed as a result of conduct intended to inflate the futures market price.

Whether a plaintiff who owns a commodity must show harm directly from an artificially low futures price or only proximately from the actions of the defendants which violate the CEA is thus both an important question of federal law and an issue on which the circuits disagree. The complexity of economic causation and the variety of schemes which are used to manipulate markets make it likely that the question will recur. The degree of economic causality which the law requires to recover damages is a general question

which arises in many securities and antitrust actions, as well as in the commodities field. Resolution of this issue under the CEA will guide lower courts faced with similar scenarios under the same and different statutes.

For the above reasons, and because of the conflict between constriction of the private right of action in *Utesch* and the broad holding in *Leist*, this Petition should be granted.

III. The Court Should Consider Whether a Corporate President Can, under § 1 of the Sherman Act, Cause the Company to Conspire with Him when He is Pursuing his Private Interests.

A. The Decision Below Conflicts with the Holdings of Other Circuits on an Important Issue of Federal Law.

The Eighth Circuit rejected the jury's verdict under Sherman Act § 1 because the court found no one with whom Dittmer could conspire. As to a conspiracy with Refco, the court discussed only the evidence that Refco acted by someone other than Dittmer.[9] The court disregarded the obvious claim by plaintiffs: Dittmer, in his individual capacity as a cattle raiser and a speculator in cattle futures, conspired with Refco, which he commanded in his corporate capacity as its president, chief executive officer, and majority shareholder. Thus, by pursuing his personal plan to profit from his futures trading while inflicting injury on his cattle

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9. That analysis was also fatally flawed, as discussed in Part B of Point I above (at pp. 18-19) concerning Dittmer's conspiracy with Refco and its brokers to inflate the futures market.

producing competitors and thereby driving their market price low (at a time he had virtually no cattle to deliver himself), he caused Refco to inflate the futures price as the essential first step in his plan. He ultimately reaped over $2 million in profits in trades in three accounts (Tr. 1584:19-1585:1; 1585:23-1586:1), and nearly $3.9 million in trading proceeds in other accounts (Exhs. Z, p. 96; X, pp. 179-180). Petitioners suffered losses exceeding $229,000. 46a-47a.

Numerous appellate courts, including the Eighth Circuit, have previously held that a corporate officer, when pursuing his or her own private interests (such as Dittmer's interest as a cattle producer and a futures speculator), may be found to have conspired with the corporation. *See, e.g., Greenville Publishing Co. v. Daily Reflector, Inc.*, 496 F.2d 391, 199 (4th Cir. 1974) (president conspired with corporation); *St. Joseph's Hospital, Inc. v. Hospital Corp. of America*, 795 F.2d 948, 956 (11th Cir. 1986); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 215 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987); *Motive Parts Warehouse v. Facet Enterprises*, 774 F.2d 380 (10th Cir. 1985); *Victorian House, Inc. v. Fisher Camuto Corp.*, 769 F.2d 466, 469 (8th Cir. 1985); *Tunis Bros. Co., Inc. v. Ford Motor Co.*, 763 F.2d 1482, 1496 and n.22 (3d Cir. 1985), *vacated and remanded*, 475 U.S. 1105 (1986), *readopted*, 823 F.2d 49, 50 n.2 (3d Cir. 1987), *cert. denied*, 484 U.S. 1060 (1988).[10]

The ruling below conflicts with these appellate decisions. Since the issue whether Dittmer, acting either for himself or for his cattle raising operation, conspired with

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10. The Court acknowledged this line of cases in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 n.15 (1984).

Refco was presented to the jury, its verdict for plaintiffs implicitly found such a conspiracy to exist. The failure of the court of appeals to uphold that verdict mandates review by the Court.[11]

B. By Failing to Address this Contention, the Court Below so Far Departed from the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise by the Court of its Power of Supervision.

In reversing the antitrust judgment on the issue of conspiracy, the court of appeals failed to address in its opinion the contention presented here. The court thus departed significantly from the accepted and usual course of judicial procedure. "Every party is entitled to a full, considered, and impartial review [by the court of appeals] of the decision of the trial court." *Matter of McLinn*, 739 F.2d 1395, 1398 (9th Cir. 1984) (en banc). The Court should accept review in order to uphold Petitioners' right to appellate consideration of the question involved and to correct the manifest failure by the court below to provide them with that review.

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11. As discussed in Point I above, the decision below violates the seventh amendment in addition to being erroneous as a matter of substantive antitrust law.

CONCLUSION

For all the foregoing reasons, the Court should grant the writ of certiorari to review the important questions presented in this Petition.

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Dated: March 2, 1992

CERTIFICATE OF SERVICE

I hereby certify that I did this date cause three true copies of the foregoing Petition for Writ of Certiorari and accompanying Appendix to be served upon the following attorney for respondents by United States first class mail, postage prepaid:

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